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5 UNITED STATES BANKRUPTCY COURT
6 EASTERN DISTRICT OF CALIFORNIA
7 SACRAMENTO DIVISION

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11 In re) Case No. 16-21585-A-11
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14) Docket Control No.: None
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17 **MEMORANDUM**

18 This Memorandum addresses two separate motions, one by
19 debtor Aiad Samuel ("Mr. Samuel") and the other by debtor Hoda
20 Samuel ("Mrs. Samuel"). Dockets 1121 & 1122; see also Docket
21 1123 (pleading identical to Docket 1122). Both motions demand
22 that Judge McManus recuse himself and that their case be
23 reassigned to another judge. These motions are based on the
24 assertion that Judge McManus has a conflict of interest and has a
25 "clear prejudice" against the debtors as well as Mr. Samuel's
attorney, Richard Jare. Docket 1123 at 1.

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1 I

2 Specifically, the debtors assert:

3 (1) the court has been "favoring of the Trustee and other
4 individuals with clear conflicts of interest;" the court has
5 condoned the illegal taking of their assets; the court has
6 improperly approved sales of their properties; the court allowed
7 the trustee to sell their assets for pennies on the dollar,
8 without proper appraisals, and "under highly suspicious criminal
9 circumstances;"

10 (2) Judge McManus' former law firm and "the parties" have
11 professional and business connections to the buyers of the
12 properties that were sold;

13 (3) the court has conspired against the debtors, cooperating
14 in the enforcement of an illegal, invalid, and unenforceable
15 garnishment order of the magistrate court; the court has violated
16 "the terms of judgment that [Mrs. Samuel] is contesting;" the
17 court has violated the "terms of compromise agreements;"

18 (4) the court has not investigated the FDIC's claim of over
19 three million dollars;

20 (5) the court did not dismiss Mrs. Samuel from the case even
21 though she did not sign the petition or the schedules and did no
22 credit counseling;

23 (6) the court has not allowed Mrs. Samuel to participate in
24 matters before the court; the court has denied Mrs. Samuel
25 representation at hearings, despite her requests for legal
26 counsel;

27 (7) the court has violated their civil rights and due
28 process by:

- 1 (a) depriving them of the opportunity to amend their
2 schedules;
- 3 (b) denying Mr. Samuel "fair and impartial hearing[s]" on
4 the trustee's failures of management of the properties and
5 his failure to undo the \$200,000 garnishment by the United
6 States from the debtors;
- 7 (c) the court has ignored or refused to consider court
8 filings, including the objections of Mrs. Samuel to the
9 court's jurisdiction over her;
- 10 (d) the court has ignored that Mrs. Samuel "is never
11 included on any notices or mailings from this court or any
12 of the attorneys for the Trustee," violating her due
13 process; Mrs. Samuel was "kept in dim darkness of all
14 decisions, orders, negotiations or offers;"
- 15 (e) Mrs. Samuel "was not timely noticed of the upcoming
16 hearing in August" on the confirmation of a plan filed by
17 the chapter 11 trustee.

18 Dockets 1121, 1122, 1123.

19

20 II

21 The debtors filed this chapter 11 case on March 15, 2016.
22 After a motion by a creditor secured by one of the debtors'
23 commercial properties, on May 3, 2016 the court appointed a
24 chapter 11 trustee to administer an estate that consisted
25 primarily of four shopping centers and six residential
26 properties.

27 During the course of the case, the trustee and his
28 professionals spent considerable time and resources dealing with

1 the debtors' obstruction and lack of cooperation.

2 For example, the debtors filed repeated motions to dismiss
3 the case and to remove the trustee. These motions were
4 unsupported by evidence (or admissible evidence), not noticed for
5 hearing, and without proof that they were ever served on anyone.
6 While Mrs. Samuel has been in federal prison throughout the case,
7 Mr. Samuel has refused to cooperate with the trustee. He has
8 refused to provide the trustee, the creditors, and the court with
9 information about their assets, their liabilities, and the
10 identity of all their creditors.

11 The trustee eventually marketed and sold all of the debtors'
12 shopping centers. The court approved the sale of three of the
13 shopping centers in January 2017. The sale of the last shopping
14 center was approved in January 2018. The debtors appealed the
15 orders approving the sales. The debtors did not prevail on any
16 of their appeals. All sale orders are now final, the sales have
17 been consummated and the trustee is in the process of confirming
18 a chapter 11 plan. The residential properties have been either
19 abandoned or will be disposed of through the plan.

20

21 III

22 Fed. R. Bankr. P. 5004(a) provides that "*[a] bankruptcy*
23 *judge shall be governed by 28 U.S.C. § 455, and disqualified from*
24 *presiding over the proceeding or contested matter in which the*
25 *disqualifying circumstances arises or, if appropriate, shall be*
26 *disqualified from presiding over the case.*"

27 Rule 5004(a) thus makes 28 U.S.C. § 455 applicable to
28 bankruptcy judges. 28 U.S.C. § 144 is applicable to proceedings

1 in the district court, not the bankruptcy court

2 28 U.S.C. § 455(a) requires a bankruptcy judge to disqualify
3 himself in any proceeding in which his impartiality might
4 reasonably be questioned. “[W]hat matters [here] is not the
5 reality of bias or prejudice but its appearance.” Liteky v.
6 United States, 510 U.S. 540, 548 (1994); see also 28 U.S.C. §
7 455(a). This is an objective test, requiring a consideration of
8 whether a reasonable person with knowledge of all the facts would
9 conclude that the judge’s impartiality might reasonably be
10 questioned. United States v. Nelson, 718 F.2d 315, 321 (9th Cir.
11 1983). Although not required or necessary, knowledge obtained
12 from extra-judicial sources is “a significant [and often
13 determinative factor] . . . in recusal jurisprudence.” Liteky v.
14 United States, 510 U.S. 540, 554-55 (1994).

15 The judge also shall disqualify himself “[w]here he has a
16 personal bias or prejudice concerning a party, or personal
17 knowledge of disputed evidentiary facts concerning the
18 proceeding.” 28 U.S.C. § 455(b)(1).

19 Judges are obligated to perform their duties fairly,
20 impartially and diligently. See ABA CJC, Canon 2, Rules 2.2,
21 2.5. A judge should not display bias or prejudice in a case or a
22 proceeding over which he presides. See 28 U.S.C. § 455(a),
23 (b)(1). Bias or prejudice are generally defined as a judicial
24 predisposition that is wrongful or inappropriate and that goes
25 beyond what is normal and acceptable. Liteky v. United States,
26 510 U.S. 540, 552 (1994).

27 Adverse rulings, however, cannot in themselves form the
28 appropriate grounds for disqualification. Liteky at 555; Lipari

1 v. U.S. Bancorp N.A., 345 F. App'x 315, 317 (10th Cir. 2009);
2 Green v. Branson, 108 F.3d 1296, 1305 (10th Cir. 1997); U.S.
3 Trustee v. Lebbos (In re Lebbos), 439 B.R. 154, 162 (E.D. Cal.
4 2010), aff'd, 529 F. App'x 854 (9th Cir. 2013).

5
6 IV

7 There is no basis in fact or in law for recusal in this case
8 and no reasonable person would conclude otherwise.

9 The motions are not supported by any evidence, such as a
10 declaration or an affidavit. See Local Bankruptcy Rule
11 9014-1(d) (3) (D). Nonetheless, the court will address the various
12 accusations, many of which rehash arguments previously raised by
13 the debtors and addressed by the court.

14
15 **A**

16 The court has not improperly favored the chapter 11 trustee
17 over the debtors. Although the court has ruled against the
18 debtors in connection with the appointment of a trustee and the
19 trustee's administration of the estate, this is not due to a bias
20 or prejudice against the debtors or in favor of the trustee. An
21 adverse ruling against a party does not necessarily mean that the
22 court has a bias or prejudice against the party. Liteky at 555;
23 Lipari v. U.S. Bancorp N.A., 345 F. App'x 315, 317 (10th Cir.
24 2009); Green v. Branson, 108 F.3d 1296, 1305 (10th Cir. 1997).

25 The debtors filed this chapter 11 bankruptcy case
26 voluntarily, on March 15, 2016. The estate consisted of
27 substantial commercial debt and assets, including several
28 shopping centers. Chapter 11 bankruptcy is complex and difficult

1 to navigate, especially for individual debtors without counsel.
2 Nonetheless, the debtors filed the case without legal counsel.
3 Mrs. Samuel was (and is still) in federal prison, serving a
4 sentence for crimes related to a scheme that defrauded federally
5 insured real estate lenders. Mr. Samuel represented that he had
6 executed the bankruptcy petition on her behalf pursuant to a
7 power of attorney.

8 From the start, the case was plagued with serious and
9 substantial issues, largely caused by the debtors. Dockets 61,
10 67, 75; see also Dockets 379, 381, 382.

11 The debtors did not file all schedules and statements when
12 the case was filed. When they were filed, there were significant
13 omissions. For instance, they did not disclose all their assets
14 including properties in Hawaii and San Bernardino, California,
15 and they did not list all their creditors. It appeared to the
16 court that the debtors were concealing their bankruptcy filing
17 from some of their creditors, particularly Brake Masters Holdings
18 SAC, Inc.

19 Also, the debtors used rents generated by the various
20 properties without the court's authorization or the permission of
21 the creditors secured by those rents, in violation of 11 U.S.C.
22 363(c)(2). And, the debtors failed to open debtor in possession
23 bank accounts. Dockets 45, 61, 379, 381, 382.

24 This prompted a secured creditor to move for the conversion
25 of the case to chapter 7. While the court was compelled to
26 remove the debtors from their stewardship of the bankruptcy
27 estate because of their inability to follow the rules governing
28 chapter 11 and grasp the urgency and gravity of their failure to

1 do so, the court concluded that the appointment of a chapter 11
2 trustee, rather than conversion of a case with an operating
3 business, was in the best interests of the creditors.

4 The appointment of the trustee prompted the debtors to
5 actively hinder and delay the administration of the estate,
6 seeking multiple times dismissal of the case and removal of the
7 trustee. Their motions to dismiss and to remove the trustee were
8 filed without evidence¹ or proof that they were served, and they
9 were never set for hearing. See, e.g., Dockets 69, 82, 83, 96,
10 305.

11 Given Mrs. Samuel's imprisonment, she was and is still
12 unavailable to assist the trustee. Mr. Samuel refused outright
13 to cooperate with the trustee. He refused to provide information
14 about the estate's assets and liabilities, requiring the trustee
15 to launch his own investigation into the debtors' assets and the
16 identity of creditors. See, e.g., Docket 203 (outlining some of
17 the trustee's efforts to ascertain the identity of creditors).

18 On one hand, Mr. Samuel complained that the trustee was
19 mismanaging the estate. On the other hand, he refused to share
20 information with the trustee about the estate's assets and
21 liabilities in violation of his duties under 11 U.S.C. §
22 521(a)(3).

23 Mr. Samuel regularly appeared at court hearings. His
24 presentations generally consisted of accusations of improper

25 _____

26 ¹ The only exception of which the court is aware is an
27 "affidavit" Hoda Samuel filed several times, on January 3,
28 January 9, and February 3, 2017. The affidavit was not notarized
and was not linked to any matter set for hearing before the
court. Dockets 447, 451, 654.

1 conduct, yelling at whomever he disagreed with, and were always
2 without any basis in fact. Mr. Samuel's threatening demeanor and
3 outbursts at times required the court to summon security
4 personnel into the courtroom to maintain order.

5 The debtors attempted to retain an attorney, Edward Smith,
6 in order to prosecute a motion to reinstate them as debtors in
7 possession. However, just before the hearing on a motion to
8 approve his employment, Mr. Smith declined to go forward because
9 the debtors had not given him the records he needed to prosecute
10 a motion to reinstate them as debtors in possession. Docket 78 &
11 137.

12 On August 25, 2016, the court approved the substitution of
13 Richard Jare in the place of Edward Smith, as counsel for Mr.
14 Samuel only. Docket 234.

15 At that point, because Mr. Samuel was represented by
16 counsel, the court required Mr. Jare to argue on behalf of Mr.
17 Samuel at nonevidentiary hearings. Nonetheless, on the occasions
18 when Mr. Samuel wished to interject himself at hearings, the
19 court offered to give time to Mr. Samuel to confer with Mr. Jare
20 so he could hear Mr. Samuel's concerns and then supplement his
21 argument on Mr. Samuel's behalf. This did not stop Mr. Samuel's
22 frequent outbursts.

23 The trustee moved forward with the marketing of the
24 properties. Just as the trustee found buyers to sell the
25 properties, Mr. Samuel offered to refinance the shopping centers.
26 However, he had no proposed loan in hand. Mr. Samuel's offer was
27 a "letter of intent" from a loan broker, subject to
28 "underwriting, appraisal review, and quality control standards."

1 Dockets 475, 495, 511. The loan broker even refused to disclose
2 the proposed lender. Dockets 478, 489, 500, 516. Mr. Samuel, in
3 other words, sought to prevent the sales while he attempted to
4 find financing.

5 The trustee rejected Mr. Samuel's refinance offer for
6 several reasons. The trustee himself had considered refinancing
7 the properties prior to marketing them for sale, without finding
8 a way to do it. Mr. Samuel's refinance offer brought nothing new
9 to the option. Mr. Samuel had not secured a loan. He had found
10 a loan broker to look for a willing lender.

11 Also, the properties were in substantial disrepair and had
12 numerous deferred maintenance issues. The estate had no cash on
13 hand to adequately address these issues. Mr. Samuel's
14 appraisals, upon which the refinance would be based, did not
15 appear to take into account the costs to correct the properties'
16 degraded existing condition. See Dockets 476, 480, 490, 491,
17 493, 496, 498, 512, 514. And, in their existing condition, the
18 rental income generated by the properties was insufficient to
19 support a refinance.

20 Moreover, the trustee did not file the first sale motion
21 until December 23, 2016, approximately seven months after his
22 appointment. When the court began considering the sales, then,
23 the debtors already had ample time to seek a refinance or propose
24 some other reorganization. Dockets 61, 409, 417, 425, 599, 607,
25 659.

26 Therefore, the court denied Mr. Samuel's request to delay
27 the sales. Dockets 599, 607, 659.

28 ///

1 The debtors' other objections to the sales also were without
2 merit. The court was unconvinced by Mr. Samuel's challenges to
3 the purchase prices, values of the properties, marketing of the
4 properties, the qualifications of the trustee's real estate
5 broker, or the broker's representation of both the seller and
6 buyer in the transactions. See Dockets 599, 607, 659.

7 The properties had been marketed on the open market for
8 several months. The trustee submitted the highest and best
9 offers received for the properties. Overbids were presented for
10 the properties at the hearings on the sale motions. Two of the
11 shopping centers received six offers each and one shopping center
12 received nine offers. Dockets 599, 607, 659.

13 Mr. Samuel's appraisals of the properties were not
14 persuasive because his appraiser relied, not on their actual
15 income, but on potential income assuming the properties were
16 rehabilitated and fully leased. The appraisals also failed to
17 disclose the assumed income streams upon which they relied.
18 Dockets 599, 607, 659; Dockets 480, 493, 498, 514; Dockets 476 &
19 490 & 491 & 496 & 512, each at 17, 28, 63, 74, 109, 120.

20 The properties were in substantial disrepair and there were
21 many deferred maintenance issues. The estate did not have cash
22 to adequately repair and improve the properties. Dockets 599,
23 607, 659. Due to their poor condition, the trustee decided that
24 liquidation in their existing condition was the best course of
25 action. The court did not disagree. Dockets 599, 607, 659.

26 The debtors offered no basis for questioning the
27 qualifications of the estate's real estate broker. Its
28 employment had been approved and qualifications established well

1 before the sales. The debtors had not objected to those
2 qualifications when the broker's employment was approved. The
3 court also determined that the broker's representation of the
4 estate and the buyers was in the best interest of the estate
5 inasmuch as each offer was highest and best among multiple
6 offers. Two of the shopping centers received six offers each and
7 one shopping center received nine offers. Dockets 599, 607, 659.

8 Around the time of the sales, Mrs. Samuel sought dismissal
9 of the case as to herself.² See Dockets 450 & 471. For that
10 reason, the court considered the impact of such a dismissal on
11 the trustee's ability to sell the properties. It concluded that
12 even if she were not a debtor, because the properties were the
13 community property of the debtors, the trustee would be able to
14 sell the interests of both Mr. and Mrs. Samuel. See 11 U.S.C. §
15 541(a)(2).

16 Community property is liable for the debts of both spouses
17 incurred during the course of the marriage. See Cal. Fam. Code §
18 910. The result is no different in bankruptcy. Even when only
19 one spouse is a debtor in a bankruptcy case, the community
20 property interests of both spouses becomes property of the
21 bankruptcy estate and may be used to pay community claims. See
22 11 U.S.C. §§ 541(a)(2), 726(c) & 1129(a)(7)(A)(ii); Dockets 599,
23 607, 659.

24 The evidence indicated that three of the shopping center
25 properties were community property. See Dockets 599, 607, 659.

27 ² At the same time, for approximately one and one-half
28 months, Mrs. Samuel retained an attorney, Patricia Miller, to
represent her. See Dockets 471 & 713.

1 The fourth shopping center was owned by a limited liability
2 company, which the trustee was later able to substantively
3 consolidate with the debtors' bankruptcy estate. See Dockets 765
4 & 995.

5 Mrs. Samuel's community property interest in the three
6 shopping centers and the limited liability company would be
7 property of the bankruptcy estate even if she were not a debtor.
8 While the judgment obtained by the United States is against Mrs.
9 Samuel only, it was entered in July 2014 when Mr. and Mrs. Samuel
10 were married and is based on Mrs. Samuel's criminal misconduct
11 during the marriage. It was a community claim.

12 Hence, even if Mrs. Samuel were not a debtor in this case,
13 her interests in the properties were property of the bankruptcy
14 estate which the trustee could sell and then use the proceeds to
15 satisfy the community claim held by the United States. See
16 Dockets 599, 607, 659.

17 The court approved in January 2018 the sale of the fourth
18 shopping center, which had been brought into the estate as a
19 result of substantive consolidation with the debtors' limited
20 liability company. Docket 995. Mr. Samuel's objections to that
21 sale mirrored those raised in connection with the sales of the
22 other shopping centers – insufficient marketing, sale for less
23 than fair market value, the property could be developed for some
24 other use. The court rejected the objections. The property had
25 been adequately marketed since approximately April 2017, Mr.
26 Samuel's appraisal of the property was based on assumptions not
27 based in reality, and the estate had no resources to redevelop
28 the property. Docket 995.

1 Therefore, any reasonable consideration of the record
2 indicates that the court had ample cause to appoint a trustee and
3 authorize the sales when requested by the trustee. The court
4 carefully considered the debtors' many objections but disagreed
5 with them for reasons laid out in detailed and comprehensive
6 written rulings. There was no bias or prejudice by the court,
7 personal or otherwise, against the debtors or in favor of the
8 trustee or anyone else.

9

10 **B**

11 The debtors allege that there are connections between Judge
12 McManus and the trustee's law firm, "the parties," and the buyers
13 of the properties requiring his recusal. Docket 1121 at 3. The
14 court assumes "the parties" refers to the trustee.

15 Judge McManus last practiced law in 1993 while at
16 Diepenbrock, Wulff, Plant & Hannegan. He was appointed to the
17 bankruptcy bench on January 11, 1994. The Diepenbrock firm
18 dissolved in the late 1990s.

19 One of the members in the Diepenbrock firm, Steven
20 Felderstein, and two of its associates, Thomas Willoughby and
21 Paul Pascuzzi, (none of whom have appeared in this case) are
22 members of the law firm now representing the trustee,
23 Felderstein, Fitzgerald, Willoughby & Pascuzzi. Judge McManus
24 has no professional or business connection to this firm other
25 than his former membership in the Diepenbrock firm.

26 A bankruptcy judge's impartiality cannot reasonably be
27 questioned based on a former professional association that ended
28 in all respects approximately 24 years ago. See Code of Conduct

1 for United States Judges, Canon 3(C).

2 The court approved four sales of commercial properties,
3 three in January and February 2017 and one in January 2018.
4 Multiple buyers and bidders were involved in these sales. None
5 of the buyers were identified at the time of the sales as having
6 any connection to the court or the trustee or counsel for the
7 trustee. The court is aware of no business, social, or other
8 connections.

9
10 **C**

11 The court has already addressed at length Mrs. Samuel's
12 motion to dismiss the case in its February 13, 2017 ruling.
13 Docket 692 at 1-3. It is repeated here.

14 Mrs. Samuel's contention that her failure to
15 obtain pre-petition credit counseling as required by 11
U.S.C. § 109(h) warrants dismissal lacks merit. Credit
counseling is not a jurisdictional requirement. It is
rather a question of individual eligibility that is
subject to both waiver and estoppel. Mendez v. Salven
(In re Mendez), 367 B.R. 109, 115-17 (B.A.P. 9th Cir.
2007). Mrs. Samuel waived her right to assert the lack
of pre-petition credit counseling as reason for
dismissal of the case. She, along with her spouse,
filed this case on March 15, 2016, approximately one
year ago. For nearly 10 months, Mrs. Samuel did
nothing to assert her lack of pre-petition credit
counseling. Only after the trustee rejected Mr.
Samuel's offer to refinance the shopping center
properties and filed motions to sell those properties,
did Mrs. Samuel raise eligibility under section 109(h).
Docket 450.

23 Mrs. Samuel also attempts to justify dismissal by
her failure to sign the bankruptcy petition, schedules,
24 and statements. As admitted by Mrs. Samuel, however,
Mr. Samuel filed this bankruptcy case on his and her
25 behalf pursuant to a power of attorney given to him by
Mrs. Samuel. Mr. Samuel also told the court that he
had filed this case on Mrs. Samuel's behalf pursuant to
her power of attorney. Dockets 82 at 1, 450, 581.

27 When the court commented during a hearing that,
despite the power of attorney, Mrs. Samuel needed to
28 sign the schedules, the court was pointing out only

1 that Mr. Samuel could not, as her attorney in fact,
2 testify on her behalf or act as her attorney at law.
3 He could not attest for Mrs. Samuel as to the accuracy
4 of the schedules. Nor could Mr. Samuel act as her
5 attorney at law, as opposed to her attorney in fact.

6 Mrs. Samuel's failure to sign the schedules does
7 not change the fact that Mr. Samuel filed the voluntary
8 bankruptcy petition on Mrs. Samuel's behalf, with her
9 consent and permission, pursuant to the power of
10 attorney. Dockets 1 & 63. Mrs. Samuel's later refusal
11 to sign the schedules, in an effort to trigger a
12 dismissal of the case, could be cause for dismissal but
13 dismissal was not mandatory. See 11 U.S.C. §
14 1112(b)(4)(F). Indeed, Fed. R. Bankr. P. 1007(k),
15 permits the court to authorize someone else to file
16 schedules and statements when a debtor fails to do so.
17 A dismissal is not the necessary result from a debtor's
18 failure to file these documents. And, even if there is
19 cause for dismissal, the court is required to dismiss,
20 convert the case to chapter 7, or appoint a trustee,
21 whichever is in the best interests of all creditors and
22 the estate. See 11 U.S.C. § 1112(b)(1). The court
23 opted, for many reasons, to appoint a trustee. See
24 Docket 61, Civil Minutes including the courts findings
25 of fact and conclusions of law.

26 She has also waived any challenge to Mr. Samuel's
27 filing of this case on her behalf under the power of
28 attorney.

29 A power of attorney may be used to file bankruptcy
30 on behalf of someone else. United States v. Spurlin,
31 664 F.3d 954, 959 (5th Cir. 2011); In re Ballard, Case
32 No. I-87-00718, 1987 WL 191320 (Bankr. N.D. Cal. April
33 30, 1987) (permitting a wife to sign, under a power of
34 attorney, a joint bankruptcy petition for her husband,
35 who was serving in the military). And, while it would
36 have been good form for Mr. Samuel to attach the power
37 of attorney to the petition when he signed on Mrs.
38 Samuel's behalf, this was not mandatory. See Fed. R.
39 Bankr. P. 9010(a).

40 After the court indicated on May 2, 2016 that it
41 was appointing a chapter 11 trustee to administer the
42 estate, Mr. Samuel filed on May 16, 2016, a motion to
43 dismiss the case, citing Mrs. Samuel's unwillingness to
44 sign the schedules. Dockets 61 & 82. The dismissal
45 motion states that "Hoda Samuel has advised her husband
46 that she no longer wishes to proceed with the
47 bankruptcy." Docket 82 at 2 (Emphasis added).

48 In other words, when the case was filed, she was
49 willing to proceed with the bankruptcy. She had no
50 issue with Mr. Samuel's use of the power of attorney to
51 file this case on her behalf. But, when it looked as
52 if the debtors were about to lose control over the
53 estate because of the appointment of a trustee, she no
54 longer wished to proceed with the bankruptcy.
55 Unfortunately for her, once the case was filed, it

1 could not be dismissed without satisfying 11 U.S.C. §
2 1112(b) (1). Rather than demonstrating that dismissal
3 was in the best interest of creditors and the estate,
4 Mrs. Samuel attempted to obtain dismissal by pointing
5 to defects that were within the control of herself and
6 her husband.

7 As she did with her eligibility under 11 U.S.C. §
8 109(h), Mrs. Samuel did not contest Mr. Samuel's
9 authority to file this case pursuant to the power of
10 attorney until the trustee filed the motions to sell
11 the shopping centers, on December 23, 2016. Prior to
12 that, Mrs. Samuel participated in this case with Mr.
13 Samuel, without objecting to his exercise of authority
14 under the power of attorney.

15 For instance, Mr. Samuel filed motions to dismiss
16 on his and her behalf, on May 16, 2016. Dockets 82 &
17 83. Mrs. Samuel and Mr. Samuel also retained an
18 attorney – Edward Smith – together. Docket 78. She
19 could not have personally retained Mr. Smith as her
20 counsel because she has been and is incarcerated in
Texas. The application to employ Mr. Smith as their
counsel is executed "Aiad Samuel, individually and on
behalf of Hoda Samuel through durable power of
attorney." Docket 78 at 7.

21 On May 25, 2016, Mrs. Samuel even filed her own
22 change of address request. Docket 97.

23 Mrs. Samuel also did nothing to revoke Mr.
24 Samuel's power of attorney prior to the December 23,
25 2016 filing of the motions to sell. Nor did she file
26 her own motion to dismiss the case prior to the sale
motions. Her first motion to dismiss was not filed
until January 9, 2017. Docket 450.

27 Mrs. Samuel has waived or is estopped to assert
28 any argument based on her failure to sign documents,
obtain credit counseling, or be examined at a meeting
of creditors, as a basis for the dismissal of this
bankruptcy case. It was filed with her consent by her
husband and dismissal is unwarranted under section
1112(b) (1).

21 Mrs. Samuel has admitted she executed a power of attorney
22 giving Mr. Samuel authority to file this case on her behalf, and
23 further admitted that she consented to the filing of this case.

24 On February 2, 2017, just before the above ruling was
25 prepared, Mrs. Samuel filed a pleading titled "Judicial Notice-
26 Power of Attorney is Provoked [sic]." In it, she acknowledges a
27 "Power of Attorney she had given previously to Aiad Samuel."
28 Docket 630.

1 On August 21, 2017, Mrs. Samuel filed a reply to the
2 trustee's response to her motion to discharge her attorneys
3 (Docket 853), where she unequivocally states that "[she] advised
4 the court via affidavit in December on [sic] 2016 that she had
5 consented to the filing of the Bankruptcy Petition." Docket 893
6 at 2; Docket 894 at 2; Docket 895 at 2.

7 Accordingly, this case was filed with Mrs. Samuel's
8 knowledge, consent, authorization. Her failure to obtain credit
9 counseling or sign documents did not require dismissal of the
10 case, either entirely or as to Mrs. Samuel only.

11
12 **D**

13 The court has not prevented Mrs. Samuel from participating
14 in this case by not retaining an attorney for her. Mrs. Samuel
15 was and is free to hire an attorney, just as she did when she
16 briefly retained Patricia Miller, and just as her husband did.
17 She does not need the court's permission to hire one. To the
18 extent she wants a court-appointed attorney (that is, one paid
19 for by the court), the court addressed her request on February
20 13, 2017. Docket 629, 668, 694, 698. The court held:

21 The court does not have the authority or means to
22 appoint an attorney for Mrs. Samuel. In bankruptcy
23 cases, there is no right to counsel such as it exists
24 in criminal cases. Nothing entitles Mrs. Samuel to an
attorney, just because she is unable to afford one.
Many debtors seeking bankruptcy relief are unable to
afford an attorney. This does not qualify them for
free legal representation.

25 Mrs. Samuel is not a debtor-in-possession. When
the court appointed a trustee, the debtors were removed
26 as administrators of the estate. Estate funds then are
not available to fund Mrs. Samuel's legal
27 representation.

28 Docket 694.

E

The court has not denied the debtors the opportunity to amend their schedules and statements. Fed. R. Bankr. P. 1009(a) permits a debtor to amend schedules and statements "as a matter of course at any time." The debtors have never needed the court's permission to make amendments. When the case was filed and various parties apprised the court that the debtors had not made full and fair disclosures in their schedules and statements concerning their assets and liabilities, the court urged Mr. Samuel to amend the schedules and statements and correct any omissions and inaccuracies.

F

The court has not ignored pleadings filed by Mrs. Samuel. The court is unaware of pleadings that have been ignored. Nor has she identified any such pleadings in her motion.

A review of the docket reveals that most (perhaps all) motions filed by both debtors without the assistance of counsel were not set for hearing as required by Local Bankruptcy Rule 9014-1(f) and were not served on any parties in interest (or at least there was no certificate of service demonstrating service). Because the court requires parties to set their own motions for hearing, it might be possible to overlook a motion that was not set for hearing. However, the court believes that it dismissed these motions without prejudice because they had not been served and set for hearing, or it either set them for hearing or deemed them to be a response to a motion filed by another party and dealt with them on their merit. See, e.g., Part H below

1 discussing the motions to remove the trustee.

2

3 **G**

4 The court does not lack jurisdiction over Mrs. Samuel.

5 She and her husband filed this case voluntarily.

6 "Bankruptcy judges may hear and determine all cases under title
7 11 and all core proceedings arising under title 11, or arising in
8 a case under title 11, referred under subsection (a) of this
9 section, and may enter appropriate orders and judgments, subject
10 to review under section 158 of this title." 28 U.S.C. §
11 157(b)(1) (defining the contours of the court's subject matter
12 jurisdiction).

13 To the extent she is arguing that the court lacks personal
14 jurisdiction over her because she was not served with notices and
15 pleadings, Mrs. Samuel is incorrect. She has been served with all
16 notices and documents required to be served on the debtors.

17 Until May 2016, Mrs. Samuel was served at her address in Elk
18 Grove, California, which was the address given to the court in
19 the petition. Docket 1; see, e.g., Dockets 51, 92.

20 In May 2016, she filed a change of address request, changing
21 her address to the prison facility in Fort Worth, Texas, where
22 she has been incarcerated since prior to the filing of the case.
23 Docket 97. Since the change of address, Mrs. Samuel has been
24 served with all notices and documents at the address in Texas.

25 See, e.g., Dockets 105, 119, 175, 187, 192, 196, 246, 253, 259,
26 269, 276, 290, 297, 301, 332, 335, 345, 346, 354, 363, 371, 373,
27 375, 393, 408, 433, 434, 435, 436, 437, 438, 442, 446, 456, 464,
28 574, 577, 578, 579, 580, 598, 612, 616, 618, 620, 631, 632, 638,

1 671, 672, 752, 758, 760, 762, 764, 770, 777, 778, 785, 793, 803,
2 811, 824, 830, 849, 859, 876, 909, 914, 923, 955, 960, 962, 970,
3 972.

4 Mrs. Samuel does not deny this. Nor does she identify any
5 pleadings that were not served or were improperly served on her.
6 While there may be an issue with her receipt of mail at the
7 prison, that is an issue for the prison's authorities.

8 Finally, despite her assertion to the contrary, Mrs. Samuel
9 was given the required notice of the August 6 hearing on plan
10 confirmation. The order approving the disclosure statement and
11 setting the August 6 hearing was entered on June 28. Docket
12 1116. There was also a separate notice of the August 6
13 confirmation hearing, filed on June 29. Docket 1118. The order
14 and notice were served on all parties in interest, including Mrs.
15 Samuel at her Fort Worth, Texas address, on June 29. Docket 1119
16 at 1 & 5. This service complied with Fed. R. Bankr. P. 2002(b).
17 That is, Mrs. Samuel received more than the required 28 days of
18 notice of both the deadline for filing objections to plan
19 confirmation and the confirmation hearing. Dockets 1116 & 1118.

20

21 **H**

22 The court has not denied Mr. Samuel fair and impartial
23 hearings on the trustee's alleged failure to reverse the \$200,000
24 garnishment by the United States or on his motions to remove the
25 trustee.

26 First, the court is unaware of any motion, complaint, or
27 objection by either debtor objecting to the claim of the United
28 States, the criminal restitution order underlying the claim, or

1 orders regarding its enforcement. Its claim has been deemed
2 allowed. See 11 U.S.C. § 502(a).

3 Second, the court does not understand the argument that the
4 trustee should have filed a motion, complaint, or objection
5 concerning the claim of the United States, the criminal
6 restitution order underlying the claim, or orders regarding its
7 enforcement, or the argument that the trustee should recover the
8 \$200,000 allegedly seized before the bankruptcy was filed.

9 According to the United States' proof of claim, it asserts a
10 claim based on a criminal conviction originally entered against
11 Mrs. Samuel on August 15, 2013 and amended July 3, 2014. That
12 judgment assessed an approximate \$3.2 million restitution
13 judgment against Mrs. Samuel. The conviction and restitution
14 judgment were affirmed by the Ninth Circuit Court of Appeals.

15 Before this bankruptcy case was filed, the United States
16 began to enforce the restitution judgment. It recorded the
17 judgment as a judicial lien in Yolo and Sacramento counties. It
18 also sought writs of garnishment to seize accounts and deposits
19 belonging to both debtors. The alleged garnishment of \$200,000
20 and other attempts to enforce those writs appear to have
21 precipitated the filing of the bankruptcy. See Docket 57.

22 While the record is less than clear, Mr. Samuel apparently
23 believes that the restitution judgment cannot be enforced against
24 his interests in the various real properties and the accounts and
25 deposits targeted by the writs of garnishment. The restitution
26 judgment names only Mrs. Samuel. Therefore, he believes his
27 interests in property are not subject to the restitution
28 judgment.

1 However, the restitution judgment was entered against Mrs.
2 Samuel while she was married to Mr. Samuel. California law
3 provides that community property is liable for the payment of "a
4 debt incurred by either spouse before or during marriage . . .
5 regardless of whether one or both spouses are parties to the debt
6 or a judgment for the debt." See Cal. Family Code 910(a).

7 All property in the bankruptcy estate was acquired by Mr.
8 and Mrs. Samuel while they were married. Under California law
9 ". . . all property, real or personal, wherever situated,
10 acquired by a married person during marriage while domiciled in
11 this state is community property." Cal. Family Code § 760.
12 Unless it can be established that property acquired during
13 marriage was purchased with or is traceable to separate property,
14 the property is presumptively community property. See Valli v.
15 Valli (In re Marriage of Valli, 58 Cal. 4th 1396, 1400 (2014);
16 Brace v. Speier (In re Brace), 566 B.R. 13, 19-20 (BAP 9th Cir.
17 2017).

18 Absent some showing by the debtors that the restitution
19 judgment is not a community debt or that property in the
20 bankruptcy estate is not community property, it is difficult to
21 understand why the trustee should object to the United States'
22 claim or attempt to claw back any pre-bankruptcy garnishment. No
23 such showing has been made or offered to this court or the
24 trustee.

25 Apparently the failure of the trustee to challenge the
26 United States' claim, his assent to its payment from the proceeds
27 of the sale of real properties, and his failure to recover the
28 \$200,000 garnishment are among the reasons the debtors wish to

1 remove the trustee.

2 Mr. Samuel filed three motions to remove the trustee. The
3 first one, filed on June 14, 2016, was not set for hearing,
4 lacked any evidence, and was without proof that it had been
5 served on anyone. Docket 120. The court denied the motion
6 without prejudice, noting its deficiencies. Docket 121.

7 Mr. Samuel filed a second motion to remove the trustee on
8 August 2, 2016, with the same deficiencies. Docket 204.

9 Although Mr. Samuel had attached some documents to the motion,
10 there was no declaration or affidavit executed under the penalty
11 of perjury establishing the factual assertions in the motion and
12 authenticating the attachments. The court nevertheless prepared
13 an order setting a hearing on the motion. Docket 206. The
14 trustee and the senior mortgagee on the debtors' West Sacramento
15 shopping center filed oppositions to the motion. Dockets 226 &
16 229. At the hearing, at the request of Mr. Samuel, the hearing
17 on the motion was dropped from calendar subject to being reset on
18 the conditions that evidence was filed in support of the motion
19 and the motion was set for hearing on notice to all parties. See
20 Docket 260.

21 Mr. Samuel never reset the motion for hearing. Instead, he
22 filed another motion to remove the trustee about 10 months later,
23 on July 5, 2017. It had the same deficiencies. Docket 841. It
24 was unsupported by evidence, was not set for a hearing, and there
25 was no certificate of service. See Dockets 841 & 842. Unlike
26 the earlier motions, however, this one was filed at a time when
27 Mr. Samuel was represented by attorney Richard Jare. His
28 attorney did not serve the new motion and set it for a hearing.

1 Thus, the court has not denied a hearing to Mr. Samuel on
2 his motions to remove the trustee. One was denied without
3 prejudice, the second was dismissed by Mr. Samuel and not reset
4 for a hearing, and the third was filed but never set for a
5 hearing or served by Mr. Samuel or his attorney.

6

7 **I**

8 The remaining reasons for recusal revolve around the claim
9 of the United States. The debtors assert that Judge McManus
10 wrongly permitted the payment of this claim without investigating
11 the underlying FDIC claim for more than \$3 million even though
12 Mrs. Samuel is contesting the judgment. Further, the debtors
13 maintain that payment of the United States' claim violates a
14 compromise, and that the garnishment order of a U.S. Magistrate
15 Judge enforcing the judgment is illegal, invalid, and
16 unenforceable.

17 First, to the extent the debtors believe the restitution
18 ordered by the district court is wrong, they must address the
19 issue with the district court or in an appeal from its judgment
20 and post-judgment orders. It is this court's understanding that
21 Mrs. Samuel appealed her criminal conviction and the restitution
22 order, but her appeal was denied.

23 Second, if the United States has compromised its right to
24 collect the restitution, no such compromise has been presented to
25 this court in connection with an objection to the proof of claim
26 filed by the United States.

27 ///

28 Third, the debtors seem to be under the impression that the

1 bankruptcy court investigates claims filed by creditors before
2 they are paid. It does not. It relies on the parties to a case
3 to file and prosecute objections if there is a reason to disallow
4 a claim. In the absence of an objection, a filed proof of claim,
5 like the one filed by the United States in this case, is deemed
6 allowed and may be paid. See 11 U.S.C. § 502(a).

7 No party in interest has filed an objection to the United
8 States' claim.

9 Fourth, this court has not enforced any writ of garnishment
10 issued by another court. This appears to be a reference to the
11 \$200,000 garnishment discussed above. That garnishment took
12 place before the bankruptcy case was filed. To the extent the
13 debtors are arguing that this court is enforcing the writ because
14 it has not undone the garnishment, the court has not done so
15 because no party in interest has filed, served, and successfully
16 prosecuted the necessary proceeding to reverse the garnishment.
17 And, given what is in the record, as discussed above, the court
18 perceives no basis for doing so.

19
20 V

21 The motion for recusal will be denied. A separate order on
22 each motion will be entered.

23 The nub of the debtors' complaint is that the court ruled
24 against them when it appointed a trustee, denied motions to
25 dismiss the case and remove the trustee, authorized the trustee
26 to sell properties and pay the claims of creditors secured by
27 those properties, including the United States. The record
28 demonstrates that the court's decisions have been sound, anchored

1 in both law and fact, and are not the result of bias or prejudice
2 against the debtors or in favor of another. Viewed objectively,
3 a reasonable person would not conclude otherwise

4 The subject motions filed by the debtors also seek the
5 removal of the chapter 11 trustee. The court will consider this
6 aspect of the motions at a hearing on August 28, 2018 at 10:00
7 a.m. Any evidence the debtors wish to file in support of this
8 relief shall be filed and served on the trustee and his attorney
9 by August 13. The trustee shall file and serve any opposition by
10 August 20. The debtors may file and serve a reply to any
11 opposition by August 27.

12 The court previously continued the hearing on the
13 confirmation of the trustee's proposed plan to August 20. Given
14 the hearing on August 28, the confirmation hearing is further
15 continued to August 28. The court will consider confirmation
16 following its disposition of the motion to remove the trustee, if
17 appropriate.

18 Dated: August 07, 2018

19 By the Court

20 
Michael S. McManus
United States Bankruptcy Judge

21
22
23
24
25
26
27
28

Instructions to Clerk of Court Service List – Not Part of Order/Judgment

The Clerk of Court is instructed to send the Order/Judgment or other court generated document transmitted herewith to the parties below. The Clerk of Court will send the Order via the BNC.

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